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No. 95-5207

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BYRON KEITH COOPER, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

On Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

BRIEF FOR UTAH, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, KANSAS, MISSISSIPPI, NEBRASKA, NEVADA, NEW MEXICO, OHIO, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

(capital penalty case)

May a State constitutionally require a criminal defendant who alleges incompetency to stand trial to prove such incompetency by clear and convincing evidence?

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BRIEF FOR THE STATES OF UTAH, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

Amici States, through their respective attorneys general, share an interest in preserving a cornerstone principle of federalism: that States be permitted reasonable latitude to develop criminal prosecution procedures that promote speedy and just trial of serious crimes. At the same time, *amici* acknowledge their commitment to obey the constitutional command that a criminal defendant not be tried unless he or she understands the nature of the proceedings, and is

reasonably able to assist defense counsel. *See Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

STATEMENT OF THE CASE

Amici adopt the case statement of respondent State of Oklahoma. We observe that the evidence of Cooper's guilt appears compelling, while evidence of Cooper's incompetency to stand trial is weak. On direct appeal, the Oklahoma Court of Criminal Appeals found the record to be "virtually brimming with evidence Appellant was malingering." *Cooper v. State*, 889 P.2d 293, 313 (Okla. Crim. App. 1995).

Amici note Oklahoma's recitation that the trial court found Cooper incompetent in August 1990, and ordered him hospitalized. Several months later, the court found Cooper competent, applying Oklahoma's presumption of competency and finding that presumption not overcome by "clear and convincing" evidence. In his merits brief, Cooper does not emphasize the August 1990 incompetency finding; he simply argues that the "clear and convincing" incompetency proof standard is unconstitutional in all situations. Following suit, this brief responds to that general argument.

SUMMARY OF ARGUMENT

Consistent with its stated due process approach, this Court should deferentially review Oklahoma's statutory requirement of clear and convincing proof for incompetency to proceed. Deference is also proper because Cooper facially challenges Oklahoma's proof standard, which requires him to demonstrate that the statute could not be constitutional under any circumstance. Further, trial competency and related issues are now governed by a comprehensive matrix of constitutional law; federalism principles counsel respect for State lawmaking in the interstices of this legal matrix.

The "clear and convincing" incompetency proof standard reasonably accommodates conflicting legal and pragmatic pressures. The public and criminal defendants have a powerful interest in expeditious criminal prosecutions. Criminal defendants also have an interest against being erroneously found incompetent. Requiring that incompetency be clearly and convincingly proven, rather than proven merely by a preponderance of evidence, protects all these interests. Additionally, constitutional rules governing competency-related issues can create a dispositional "limbo" in which a defendant may be found incompetent to proceed, yet the State is barred from effectively treating the defendant to restore competency. This problem may be reduced by requiring that incompetency to proceed be proven by clear and convincing evidence, which is also the constitutionally required proof standard for civilly committing mentally ill persons.

The requirement that incompetency be clearly and convincingly proven does not impair basic rights of a criminal defense. Most particularly, a defendant remains entitled to an inquiry whenever a doubt exists about competency; this reduces the risk that a truly incompetent defendant will be tried and convicted. And the "clear and convincing" incompetency proof standard does not affect the right to raise mental illness-related defenses at trial. In fact, because the "clear and convincing" standard guards against compelled psychotropic medication of a criminal defendant, it can aid such defenses by its tendency to assure that the defendant's baseline mental condition will be observed at trial. In light of all these concerns, it is reasonable, and constitutional, to require clear and convincing proof of incompetency to proceed.

ARGUMENT

THE "CLEAR AND CONVINCING" STANDARD FOR PROVING INCOMPETENCY SERVES IMPORTANT INTERESTS AND REASONABLY ACCOMMODATES CONFLICTING LEGAL AND PRAGMATIC PRESSURES; THEREFORE, IT IS CONSTITUTIONAL

At the outset, *Amici* acknowledge the problem seemingly posed by this case: By requiring that incompetency to proceed be proven by "clear and convincing" evidence, Oklahoma's statute, Okla. Stat. Ann. tit. 22 § 1175.4B (Supp. 1995), requires a criminal defendant who is "more likely than not" incompetent, yet is not "clearly and convincingly" so, to face trial. This problem forms the basis for Cooper's arguments before this Court.

Despite this apparent problem, Oklahoma is not alone in requiring "clear and convincing" proof of incompetency. Connecticut, Pennsylvania, and Rhode Island also use this standard. Conn. Gen. Stat. § 54-56d(b) (1995); Pa. Stat. Ann., Tit. 50, § 7402(c), (d) (Supp. 1995); R.I. Gen. Laws. § 40.1-5.3-3 (Supp. 1994). The remaining States, by statute or case law, generally utilize the "preponderance" standard (see appendix I of this brief). The question, then, is whether constitutional principles permit the "clear and convincing" standard for proving incompetency. *Amici* respectfully answer in the affirmative.

I

Amici begin by identifying the parameters of the constitutional analysis. Several important principles define the nature of this Court's review.

A

First, the pertinent constitutional provision is the Due Process Clause, U.S. Const. Amend. XIV. Cooper raises both Due Process and Eighth Amendment-based challenges to the "clear and convincing" standard for proving incompetency. However, the latter provision is not implicated, because the question of competency to proceed arises prior to a guilt finding. *See Ingraham v. Wright*, 430 U.S. 651, 671-72 n. 40 (1977) (Eighth Amendment scrutiny not triggered absent criminal conviction). A separate body of Eighth Amendment law addresses incompetency to be executed. *See Ford v. Wainwright*, 477 U.S. 399 (1986). Therefore, just as criminal trial of an incompetent person is barred solely by due process, *Drope v. Missouri*, 420 U.S. 162, 172-73 (1975), the manner in which a State decides competency to proceed--even in a capital case--involves only due process analysis.

B

Next, *amici* will not address whether Oklahoma's particular definition of "clear and convincing" evidence makes that burden of proof heavier than understood by this Court in *Addington v. Texas*, 441 U.S. 418 (1979). In *Addington*, this Court described "clear and convincing" proof as an "intermediate" standard, between the traditional civil "preponderance" standard and the criminal "beyond reasonable doubt" standard. *Id.* at 424. Cooper argues that only the

lighter "preponderance" standard may be used to determine incompetency to proceed. However, he also contends that as defined by Oklahoma's stock jury instruction at the time of his competency inquiry, "clear and convincing" proof may pose a heavier burden than understood by this Court in *Addington* (Br. of Petitioner at 28). *Amici* respectfully defer to the arguments of Cooper and of Oklahoma to decide the latter contention. For purposes of this brief, the *amici* States presume that clear and convincing proof is an intermediate standard, as stated in *Addington*. We will argue that so understood, it is an appropriate standard for deciding that a defendant is incompetent to proceed.

C

Turning to the standard of review, *amici* observe that Cooper's burden of persuasion before this Court is very heavy, for two reasons. First, it appears from the Oklahoma court's opinion and from Cooper's certiorari petition that Cooper facially attacks Okla. Stat. Ann. tit. 22 § 1175.4B; no "as applied" argument is offered. Cooper's opening merits brief is also broadly framed, articulating no "as applied" analysis. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no* set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added).

Second, this Court has held that State legislative decisions receive judicial deference under the Due Process clause. Unless a statute compromises a deep-rooted, common law rule, this Court will not strike it merely because some reasonable person might find the legislature's decision unwise. The Court followed this principle in *Medina v.*

California, 505 U.S. 437 (1992), when it approved California's decision to allocate the burden of proving incompetency to proceed upon the party alleging incompetency--in that case, the defendant. "[A] state procedure 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.'" *Id.* at 451 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Deference to Oklahoma's legislative judgment is particularly appropriate in this case. Just as common law does not allocate the burden of proof to either party, *Medina*, 505 U.S. at 446-47, there appears to be no common law rule for degree of proof in competency-to-proceed inquiries. Deeming such inquiries analogous to ordinary civil proceedings, the "preponderance" standard has been applied, but no searching rationale for this practice has been expressed. *See* Charles E. Torcia, Wharton's Criminal Procedure § 426, at 785 & n. 20 (13th ed. 1991). *Compare Drope*, 420 U.S. at 171 (explaining common law basis of rule against trial of incompetents). *See also* Bruce J. Winick, Restructuring Competency to Stand Trial, 32 U.C.L.A. L. Rev. 921, 968 (1985) ("A procedural due process right to a determination of competency is not the equivalent of a substantive due process right to be immune from trial while incompetent . . ."). Therefore, assignment of the "clear and convincing" standard for proving incompetency does not, by itself, compromise any deep-rooted right.

Further, a detailed matrix of rules already exists for assessing competency to proceed. If competency is in doubt, a trial court must undertake an inquiry. *See Drope*, 420 U.S. at 173 ("reasonable cause" to doubt competency requires

inquiry); *Pate v. Robinson*, 383 U.S. 375, 385 (1966) ("bona fide question" requires inquiry). The States have painstaking procedures for competency inquiries, generally similar to recommendations of the Model Penal Code and the American Bar Association (see appendix I of this brief). The inquiry includes careful clinical evaluation, aided if necessary by inpatient observation. After clinical evaluation, there is a court hearing to legally determine whether the defendant is competent. Model Penal Code §§ 4.04 through 4.06 (1985); II American Bar Ass'n, Standards for Criminal Justice §§ 7-4.1 through 7-4.15 (2d ed. 1986). *See also* Okla. Stat. Ann. tit. 22 §§ 1175.2 through 1175.8 (1986 & Supp. 1995).

This rule matrix extends to related issues. Under the Constitution, a State has very limited authority to compel a criminal defendant to take psychotropic medication--even if arguably necessary to maintain competency. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). Additionally, a State cannot confine an incompetent defendant indefinitely; if competency cannot be restored within a reasonable time, the State must initiate civil commitment proceedings, or else release the defendant. *Jackson v. Indiana*, 406 U.S. 715, 731-39 (1972). Civil commitment, in turn, requires "clear and convincing" proof, generally of mental illness plus dangerousness. *Addington*, 441 U.S. at 433. A defendant who is tried and acquitted on insanity-type grounds can only be confined so long as he or she remains both mentally ill and dangerous. *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992). If a convicted defendant appears mentally ill, notice and an adversary hearing are required before involuntary transfer to a mental health facility can occur. *Vitek v. Jones*, 445 U.S. 480, 495 (1980). There are also constitutional limits on prison authorities' ability to control disruptive inmate

behavior with psychotropic medication. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

Given this extensive rule matrix, maximum deference should be granted to State decisions in the remaining interstices of the law dealing with competency and related issues. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431. *Cf. United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1626 (1995) ("first principles" of federalism counsel against excessive federal government intrusion into areas of primary state responsibility). Put another way, the decision of Oklahoma and several other States to require "clear and convincing" proof of incompetency need only "adequately" protect the core requirement that incompetent persons not face criminal trial, *Drope*, 420 U.S. at 172; it need not be a perfect or ideal choice, *Medina*, 505 U.S. at 451. Therefore, if any reasonable justification can be found for that decision, this Court should uphold it.

II

As *amici* now demonstrate, several such justifications exist. These justifications are based upon important public interests--interests that are arguably shared by criminal defendants. They also relate to circumstances that can be created by the above-described matrix of related law.

A

First, the States have a powerful, legitimate interest in trying criminal cases expeditiously. *See Winston v. Lee*, 470 U.S. 753, 762 (1985) ("the community's interest in fairly and

accurately determining guilt or innocence . . . is of course of great importance"); *Illinois v. Allen*, 397 U.S. 337, 347-48 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace"); *Cooper*, 889 P.2d at 303 ("The State has great interest in assuring its citizens a thorough and speedy judicial process . . ."). And, of course, criminal defendants have a constitutional right to a "speedy trial," U.S. Const. Amend. VI. Whenever a criminal trial is delayed, the preservation of evidence, and hence accuracy of the trial proceedings, becomes a problem for both parties.

It therefore is reasonable to assign a proof standard for incompetency to proceed that reduces the risk of an erroneous incompetency finding, and thereby reduces the risk of an unnecessary trial delay. The "preponderance" standard admits a high risk of an erroneous incompetency finding. *See Addington*, 441 U.S. at 426-27 ("preponderance" standard for civil commitment permits unacceptable risk of erroneous confinement). It therefore permits a high likelihood that a criminal trial will be unnecessarily delayed--that is, delayed beyond the time needed for the competency inquiry, which is required once the defendant's competency comes into doubt. The "clear and convincing" standard to prove incompetency requires that such doubt be strongly confirmed; put another way, it strengthens the presumption of competency. The standard therefore reasonably requires that if trial must be delayed because of defendant incompetency, the resulting deferral of justice will be strongly justified.

The "clear and convincing" standard for proving incompetency is also supported by the uncertainty of psychiatric diagnosis. *See Medina*, 505 U.S. at 451 (citing

Addington, 441 U.S. at 430). It often happens--as it did in this case--that examining clinicians will disagree whether the defendant is competent to proceed. Winick, 32 U.C.L.A. L. Rev. at 966 ("Many cases will be on the borderline of competency"). It is reasonable to compensate for that scientific uncertainty by requiring "clear and convincing" legal certainty in order to find a defendant incompetent to proceed. In *Addington*, based upon individual liberty concerns, this Court required that civil commitment be justified by clear and convincing evidence. Similarly powerful concerns for expeditious and accurate criminal proceedings support a similar certainty level for an incompetency finding.

These concerns are not limited to States' interests. A defendant might seek an incompetency finding in order to delay, or altogether avoid, trial on the merits; such behavior is consistent with both clinical and legal definitions of malingering. *See* American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV), at 683; Black's Law Dictionary (6th ed. 1990), at 959. However, it has also been reported that a prosecutor might allege incompetency in order to keep a defendant "off the streets" if evidence of guilt is weak. *See* II American Bar Ass'n, A.B.A. Standards for Criminal Justice, at 7.163-64; *id.* § 7-4.2, at 7.182 (2d ed. 1986). Defense counsel or prosecutors might challenge competency in order to delay a prosecution while publicity cools down, or merely to temporarily relieve their heavy workloads. Such actions harm the interests the public and defendants alike: this Court has taken notice that the "stigma" caused by involuntary mental health commitment harms even convicted criminals. *Vitek*, 445 U.S. at 492. Because the "clear and convincing" proof standard must be satisfied by the party alleging incompetency

to proceed, *e.g.*, Okla. Stat. Ann. tit. 22 §§ 1175.2A, 1175.4B (1986 & Supp. 1995), it serves the interests of both the States and criminal defendants.[1]

B

Next, in light of *Vitek*, *Jackson*, and *Addington*, there is legal tension between finding a defendant incompetent to proceed, and then, based upon such finding, initiating mental health treatment to restore competency. In *Vitek*, 445 U.S. at 491-94, this Court held that a convicted felon has a liberty interest against involuntary commitment for mental health treatment; therefore, exacting process must be followed for such commitment. *Id.* at 494-95 (approving process that includes notice, hearing, counsel, written findings). In *Jackson*, 406 U.S. at 731-39, the Court prohibited indefinite confinement of unconvicted incompetent defendants in mental institutions; if competency cannot be restored within a reasonable time, such defendants must either be released or referred for civil commitment--which, under *Addington*, requires "clear and convincing" proof.

Reading these cases, a legislature could conclude that pretrial treatment to restore mental competency requires strong justification, and must also be completed expeditiously. A legislature could also recognize that a defendant who is adjudicated incompetent may also be unable to voluntarily

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[1]The concern about erroneously finding a defendant incompetent to proceed is sufficiently powerful that at least one State--Utah--provides for a defendant's pretrial appeal of such finding as a matter of right. Utah Code Ann. § 77-18a-1(1)(d) (Supp. 1995). No such appeal is allowed from a finding of competency; nor does the prosecution have a guaranteed pretrial appeal from a finding of competency or incompetency.

consent to such treatment. An incompetency finding by a mere preponderance of the evidence might not justify involuntary mental health treatment, which normally requires clear and convincing proof. A legislature could thus perceive a legal and clinical "limbo" that is to nobody's legitimate benefit. *See* Winick, 32 U.C.L.A. L. Rev. at 945-46. But if a defendant is found incompetent by clear and convincing proof, he or she more likely also meets the clear and convincing standard for nonconsensual but clinically necessary treatment to restore competency. Indeed, in his opening merits brief to this Court, Cooper suggests that his alleged mental condition should have been "treated aggressively" (Br. of Petitioner at 10). To aid State authority to provide such treatment, a legislature could reasonably apply the "clear and convincing" requirement to pretrial incompetency findings.

In fact, the Connecticut legislature applied similar reasoning, impelled in part by a federal district court decision, *De Angelas v. Plaut*, 503 F. Supp. 775 (D. Conn. 1980), that struck that State's statute governing the confinement of incompetent criminal defendants. In *De Angelas*, the federal court struck down Connecticut's six-month review period for defendants committed to mental institutions due to incompetency, because the commitment statute did not require findings that competency could be restored within that period, and therefore violated the *Jackson* rule. 503 F. Supp. at 781. The State legislature then extensively revised its mental health laws to comply with the federal court's mandate. Besides solving the *De Angelas* problem, the legislature added the "clear and convincing" standard for incompetency to proceed. That decision was based upon the legislature's understanding of *Addington*, explained by legislative witnesses: "I would like to point out that the clear and convincing standard that

is in the proposal came out of the Supreme Court's decision in Mattington [sic: Addington] v. Texas dealing with the standard that's required for civil commitment." Conn. Public Act 81-365, S.B. 1066, tr. of Judiciary Committee Hrg. (Mar. 3, 1981), at 770, comments of witness McCullough (excerpted in appendix II of this brief); *id.* at 768 (comments of witness Zonana).[2]

This Court's *Riggins* decision adds a new, fair trial-related dimension to the legal tension between finding a defendant incompetent and attempting to restore competency. In *Riggins*, this Court reversed the capital murder conviction of a defendant who was involuntarily treated with the psychotropic medication Mellaril (thioridazine) prior to and during trial; thus medicated, the defendant raised an insanity defense, which the jury rejected. This Court held that the compelled administration of psychotropic medication, not proven "necessary to accomplish an essential state policy," 504 U.S. at 138, violated the defendant's Sixth and Fourteenth Amendment rights to effective counsel and a fair trial. That holding was supported by the possibility that the medication negatively affected the defendant's appearance, testimony, and ability to follow the proceedings and consult with counsel. *Id.* at 137. Along the way, Court suggested that a "less intrusive alternatives" inquiry is required before a criminal defendant can be compelled to take psychotropic medication while trial is under way. *Id.* at 135-36.

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[2]Full copies of the Connecticut legislative history are being lodged with the Clerk of this Court and provided to counsel for the main parties to this case. No similar, published legislative history has been found regarding Oklahoma's, Pennsylvania's, and Rhode Island's adoption of the "clear and convincing" incompetency proof standard.

Riggins thus poses a special dilemma for State lawmakers, who know that in order to be effective, treatment to restore mental competency will commonly require psychotropic medication. *See* Winick, 32 U.C.L.A. L. Rev. at 945; American Psychiatric Ass'n, Practice Guidelines for the Treatment of Patients with Substance Use Disorders: Alcohol, Cocaine, Opioids, Am. J. Psychiatry Vol. 152, No. 11, at 7-9, 29-30, 36-37, 40-42 (Nov. 1995 Supplement); American Psychiatric Ass'n, Practice Guidelines for the Treatment of Patients with Bipolar Disorder, Am. J. Psychiatry Vol. 151, No. 12, at 5-14 (Dec. 1994 Supplement); American Psychiatric Ass'n, Practice Guidelines for Major Depressive Disorder in Adults, Am. J. Psychiatry Vol. 150, No. 4, at 7-11 (April 1993 Supplement); M. Mostert & R. Boshes, "Pharmacological Treatment of Schizophrenia," in Psychiatry Diagnosis & Therapy (J. Flaherty et al. 2nd ed. 1993), at 101-13. Although *Riggins* reserved the question whether psychotropic medication may be involuntarily administered to maintain defendant competency, 504 U.S. at 136, it clearly warns lawmakers that potent constitutional concerns must be overcome if such treatment can be justified.

The State of Utah has encountered this dilemma. In 1990, a noncapital murder defendant who calls himself "Captain Nemo" was adjudicated incompetent to proceed, which only requires a preponderance of the evidence under Utah Code Ann. § 77-15-5(10) (1995), and was accordingly committed to the Utah State Hospital for treatment under Utah Code Ann. § 77-15-6 (1995). While thus committed, the defendant refused psychotropic medication, and obtained a federal court order barring such treatment. *See Woodland v. Angus*, 820 F. Supp. 1497, 1500-01 (D. Utah 1993). Heavily relying upon *Riggins*, the federal court held that even though the defendant was "not competent to make an

informed medical decision" about treatment with psychotropic medication, 820 F. Supp. at 1504, and even though the State of Utah had a "significant" interest in trying him on the criminal charges, *id.* at 1511, the State could not involuntarily medicate the defendant to restore his competency. *See id.* at 1508-1519. Not until 1994 was "Captain Nemo" found competent to proceed, tried, and convicted. His state appeal is now pending, and is expected to raise both competency and "speedy trial" issues.

Cases like "Captain Nemo" add a pragmatic concern to the legal dilemma created by *Vitek*, *Riggins*, and the other above-cited case law. An incompetent criminal defendant who occupies mental hospital space while refusing efficacious treatment denies that space to somebody who may benefit from it; he or she may also endanger hospital staff and other patients. State lawmakers and the clinicians who operate mental institutions are loath to "warehouse" such individuals, by confining them without effective treatment. To help resolve all these conflicting pressures, lawmakers could select the "clear and convincing" standard for proof of a criminal defendant's incompetency to proceed. Just as this standard provides legal justification for civil commitment, it may also provide sufficient justification for clinically appropriate use of psychotropic medication to restore competency. Even if the standard does not entirely resolve such problems, it can, and should, be viewed as a reasonable, and therefore constitutional, legislative effort to do so.

III

Amici now revisit the problem acknowledged in Point I--that a defendant who is "more likely than not" incompetent may face trial. That problem is more theoretical than real,

because the "clear and convincing" incompetency proof standard operates within a procedural matrix that adequately prevents trial of a truly incompetent defendant. *See Leland v. Oregon*, 343 U.S. 790, 793 (1952) ("To determine the merits of this challenge, the statute must be viewed in its relation to other relevant [State] law and in its place in the trial of this case"). Several features are pertinent.

A

First, the "clear and convincing" standard for proving incompetency comes into play only after extensive inquiry, consisting of clinical evaluation and an adversarial, judicial hearing. That inquiry is designed to gather and present comprehensive evidence bearing upon the elements of competency: Does the defendant understand the proceedings, and can the defendant reasonably assist counsel? Given such searching inquiry, a truly incompetent defendant should readily be found clearly and convincingly so. *See Cooper*, 889 P.2d at 303 ("A truly incompetent defendant, through his attorneys and experts, can prove incompetency with relative ease"). Therefore, the clear and convincing standard is reasonable.

Next, Oklahoma's statutes, in accord with this Court's holdings in *Pate* and *Drope*, require that competency be re-considered whenever a doubt arises: "The court, at any time, may initiate a competency determination on its own motion, without an application, if the court has a doubt as to the competency of the person." Okla. Stat. Ann. tit. 22 § 1175.2A (1986). As reflected in the Oklahoma appellate court's opinion, trial counsel can re-raise the competency question at any time, and did so in this case. *Cooper*, 889 P.2d at 312. The statutes of Connecticut, Pennsylvania, and

Rhode Island are in accord. Conn. Gen. Stat. § 54-56d(c) (1995) (inquiry may be requested any time "it appears that the defendant is not competent . . ."); Pa. Stat. Ann., Tit. 50, § 7402(c), (d) (Supp. 1995) (inquiry upon "prima facie question of incompetency"); R.I. Gen. Laws § 40.1-5.3-3 (Supp. 1994) (inquiry allowed whenever "it appears that the defendant is not competent").

This ongoing duty to watch for signs of incompetency provides a "fail-safe" guard against an erroneous finding of competency that might result from an initial failure to find incompetency by clear and convincing evidence. A court's direct observations during trial will provide additional data about the defendant's mental status. *See* Winick, 32 U.C.L.A. L. Rev. at 953-54. The trial court may thus find itself clearly and convincingly persuaded that the defendant is incompetent, and stay the prosecution accordingly. Naturally, such disposition is most likely to occur if the defendant is, in the court's initial opinion, more likely than not incompetent. Conversely, the unfolding trial may dispel judicial doubts about the defendant's competency. In either instance, the trial court's contemporaneous observations will likely be placed on record, allowing fully-informed appellate review. Such was apparently the disposition in this case, allowing the Oklahoma appellate court to confirm that Cooper was not incompetent, but instead was malingering. *Cooper*, 889 P.2d at 313. These procedures substantially reduce the risk of an erroneous competency finding, and thus adequately protect the core right not to be tried while incompetent.

B

It is also important to recognize defendant's rights that are not affected by the "clear and convincing" standard to

prove incompetency. There is no infringement upon insanity-type defenses, recognized in all the States that require clear and convincing proof of incompetency to proceed. Okla. Stat. Ann. tit. 22 §§ 1161 through 1170 (1986 & Supp. 1995); Conn. Gen. Stat. § 53a-13 (1995); Pa. Stat. Ann., Tit. 42, R. Crim. P. 305C(1)(b) (1989), Tit. 42, § 7402(e)(4)(iii)-(iv) (Supp. 1995); R.I. Gen. Laws § 40.1-5.3-4 (1990). Defenses such as duress, compulsion, entrapment, and the like are not affected, or are only indirectly affected. There is no infringement upon the right to present mitigating evidence of mental disorder at sentencing. There is no impairment of the protection against executing an incompetent person--which, as earlier explained, is a discrete inquiry under *Ford v. Wainwright*, 477 U.S. 399 (1986).

In fact, some of the foregoing defenses are more likely to succeed if the defendant appears mentally impaired to the fact finder or sentencer. Concurring in the *Riggins* judgment, Justice Kennedy suggested that a criminal defendant has what might be termed a constitutional "right to appear insane" at trial, and that involuntarily medicating a defendant is akin to manipulating material evidence. 504 U.S. at 141-45 (Kennedy, J., concurring). The "clear and convincing" proof standard for incompetency to proceed favors sending a marginally competent (or marginally incompetent) defendant to trial, where he or she will be observed in a baseline, unmedicated mental condition. Given the Sixth Amendment rationale of both the main *Riggins* opinion and Justice Kennedy's concurrence, such presentation of the marginally competent defendant can actually assist the defense.

Ability to assist defense counsel is, of course, an element of competency to proceed under *Dusky*. But *Riggins* paradoxically suggests that some degree of incompetency can

itself assist the defense. Additionally, although it has suggested that an incompetent defendant is constructively "absent" from the proceedings, *Drope v. Missouri*, 420 U.S. 162, 171 (1975), this Court has also held that a defendant's right to be present at trial "is a condition of due process to the extent that a fair and just trial would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), *overruled on other grounds*, *Duncan v. Louisiana*, 391 U.S. 145 (1968). It may therefore be significant that Cooper does not allege that his trial, even though disrupted from time to time by his behavior, reached an inaccurate or otherwise unjust verdict.

It has also been observed that the common law rule against trying incompetents arose during an era when there was no right to counsel in most criminal cases; accordingly, optimal mental acuity of the defendant was essential in order to raise a defense. Because counsel is now constitutionally guaranteed, the defendant's personal competency is now a somewhat less critical feature of a fair trial than it was at common law. Winick, 32 U.C.L.A. L. Rev. at 952-53. Given all of this, and without disputing the fundamental nature of the rule against trying incompetents, it appears that the constitutionally permissible presumption of competency, *Medina*, can be moderately strengthened. The "clear and convincing" standard for proving incompetency so strengthens that presumption, but not to an insurmountable degree.

In sum, the "clear and convincing" standard for proving incompetency to proceed does not erode the settled rule against trial of incompetent persons. Instead, it is a reasonable response to conflicting pressures, and difficult circumstances, that arise under modern law. Applied in the context of elaborate protective procedures, this proof standard

adequately protects the fundamental right to a fair trial. Therefore, it is constitutionally permissible.

CONCLUSION

For the foregoing reasons, *amici* believe that the judgment of the Oklahoma Court of Criminal Appeals should be AFFIRMED.

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APPENDIX I

APPENDIX I

SUMMARY OF STATE STATUTES AND RULES GOVERNING COMPETENCY INQUIRIES: PROCEDURES, PROOF STANDARDS, DISPOSITION UPON INCOMPETENCY FINDING.

Overview: Incompetency inquiry uniformly is triggered by a low showing that defendant is incompetent to proceed (e.g., "reason to doubt"). The clinical portion of the inquiry typically may address issues other than incompetency to proceed (e.g., insanity defense-related issues), and uniformly generates written clinicians' reports. The ensuing judicial hearing is uniformly waivable if the parties agree with the clinicians' conclusions. Absent such agreement, the hearing is adversarial; clinicians may be called and examined by both parties, and other evidence bearing upon competency may be heard. Nearly every State provides for some form of limited commitment upon a finding of incompetency to proceed.

ALABAMA:
Competency inquiry required upon "reasonable grounds" to believe that the defendant may be incompetent. *Campbell v. State*, 484 So.2d 1168 (Ala. Crim. App. 1985); Ala. Code § 15-16-21 (1995). Inquiry includes examination and report by a mental health expert; hearing. Ala. Code §15-16-22 (1995). Judicial hearing: no information. Standard of proof: no information. If incompetent, defendant is committed to state hospital until restored to his right mind. Ala. Code § 15-16-21 (1995).

ALASKA:
Inquiry upon reasonable cause. Includes examination and report by at least one qualified psychiatrist; hearing. Alaska Stat. § 12.47.100 (1995). Standard of Proof: preponderance of evidence. If incompetent, may commit defendant for upon to 90 days for evaluation and treatment. Alaska Stat. § 12.47.110(a) (1995).

ARIZONA:
Inquiry upon reasonable grounds. A.R.S. Rules of Crim. Proc., Rule 11.3a. (Supp. 1994). Includes examination by two or more mental health experts, at least one of them a medical doctor; hearing. Standard of proof: no information. If found incompetent, defendant committed up to six months or until earlier attainment of competency. A.R.S. Rules of Crim. Proc., Rule 11.5b (Supp. 1994).

ARKANSAS:
Inquiry upon reason to doubt fitness to proceed. Includes examination by one or more psychiatrists or psychologists; hearing. Ark. Code Ann. § 5-2-305 (1993). Standard of proof: no information. If incompetent, may commit defendant to Dep't of Human Services for detention care, and treatment; or may release defendant if not dangerous. Ark. Code Ann. § 5-2-310 (1993).

CALIFORNIA:
Inquiry when doubt arises in the mind of the judge about defendant's competency. Cal. Penal Code § 1368 (1992). Inquiry requires examination by qualified expert; hearing. Cal. Penal Code § 1369 (1992). Standard of Proof: preponderance. Cal. Penal Code § 1369(f) (1992). If found incompetent, defendant committed to state hospital to restore competency. Cal. Penal Code § 1370 (1992).

COLORADO:
Inquiry when "substantial issue" of competency is raised. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980). Inquiry includes optional clinical evaluation; hearing. Colo. Rev. Stat. Ann. § 16-8-111 (1986). Standard of proof: preponderance of evidence. Colo. Rev. Stat. Ann. § 16-8-111(2) (1986). If incompetent, defendant ordered into custody of the Dep't of Human Services for treatment until such time as he regains competency; outpatient treatment permitted if the defendant is not charged with a violent offense. Colo. Rev. Stat. Ann. § 16-8-112 (Supp. 1995).

CONNECTICUT:
Inquiry when it "appears" the defendant is not competent. Conn. Gen. Stat. Ann. § 54-56d.(c) (1995). Inquiry requires examination by one or more specified mental health professionals; hearing. Conn. Gen. Stat. Ann. § 54-56d.(d) (1995). Standard of proof for incompetency: Clear and convincing evidence. Conn. Gen. Stat. Ann. § 54-56d.(b) (1995). If incompetent, and substantial probability exists that treatment will restore competency, court shall order placement of the defendant for treatment. Conn. Gen. Stat. Ann. § 54-56d.(h)-(i) (1995).

DELAWARE:
Inquiry upon "bona fide doubt" of competency. *Williams v. State*, 378 A.2d 117 (Del. Super. Ct. 1977), *cert. denied*, 436 U.S. 908 (1978). Type of inquiry: no information. Standard of Proof: preponderance; prosecution must prove competency. *Diaz, v. State*, 508 A.2d 861 (Del. Super. Ct. 1986). If incompetent, court may order the defendant confined and treated in a state hospital until competency is regained. Del. Code Ann. tit. 11, § 404 (1987).

FLORIDA:
Standard to require inquiry: no information. Inquiry includes optional examination by two or three experts; hearing. Fla. Sta. ch. 916.11(b) (1991). Standard of proof: no information. Upon a showing by clear and convincing evidence that the defendant meets criteria for civil commitment, he may be committed to a mental health facility for treatment. Fla. Sta. ch. 916.13 (1991).

GEORGIA:
Inquiry upon "plea" of incompetency or when "bona fide doubt" apparent. Georgia Code Ann. § 17-7-130(a) (Supp. 1995); *White v. State*, 414 S.E.2d 328 (Ga. App. 1992). Includes examination; hearing. Georgia Code Ann. § 17-7-130( ) (Supp. 1995). Standard of proof: no on-point information, but appears to be preponderance based upon insanity requirement in *Handspike v. State*, 45 S.E.2d 662 (Ga. 1947). If incompetent, committed to Dep't of Human Resources for limited period. Georgia Code Ann. § 17-7-130(b) (Supp. 1995).

HAWAII:
Inquiry when fitness to proceed is "drawn into question." Haw. Rev. Stat. § 704-405 (1993). Includes examination by three qualified examiners; hearing. Haw. Rev. Stat. § 704-404 (1993). Standard of proof: no information. If found incompetent, court shall commit defendant to appropriate facility for care and treatment. Haw. Rev. Stat. § 704-406 (1993).

IDAHO:
Inquiry upon reason to doubt fitness to stand trial. Inquiry includes examination by at least one psychiatrist or psychologist; hearing. Idaho Code § 18-211 (1987).

Standard of proof: no information. If found incompetent, court shall commit defendant to appropriate facility for care and treatment. Idaho Code § 18-212 (1987).

ILLINOIS:
Inquiry upon bona fide doubt of competency. Ill. Comp. Stat. Ann. ch. 725, para 5/104-11 (1993). *People v. Baldwin*, 541 N.E.3d 1315 (Ill. App. Ct. 1989). Includes examination by one or more psychiatrists or psychologist; hearing. Ill. Comp. Stat. Ann. ch 725, para 5/104-13; par 5/104-15 (1993). Standard of proof: prosecution must prove competency by preponderance of evidence. Ill. Comp. Stat. Ann. ch 725, para 5/104-11(c) (1993). If found incompetent, but competency can possibly be restored, treatment shall be ordered. Ill. Comp. Stat. Ann. ch. 725, para. 5/104-16 (1993).

INDIANA:
Inquiry upon reasonable grounds to believe the defendant is incompetent. Includes examination by one or two psychiatrists or clinical psychologists; hearing. Ind. Code Ann. § 35-36-3-1 (1994). Standard of proof: no burden rests on the defendant, but instead, trial court must satisfy itself as to competency or incompetency. *Wallace v. State*, 486 N.E.2d 445, 454 (Ind. 1985). If found incompetent, defendant committed to Division of Mental Health for six months or until he regains competency, whichever occurs first. Ind. Code Ann. § 35-36-3-2 (1994).

IOWA:
Standard that requires inquiry: no information. Inquiry and hearing requirements: no information. Standard of proof: preponderance of evidence. *State v. Rhode*, 503 N.W.2d 27

(Iowa Ct. App. 1993). Disposition if found incompetent: no information.

KANSAS:
Inquiry upon reason to believe defendant is incompetent. Includes optional clinical evaluation; hearing. Kan. Stat. Ann. § 22-3302 (Supp. 1994). Standard of proof: no information. If found incompetent, court may commit defendant to institution for treatment and evaluation for a specified period. Kan. Stat. Ann. § 22-3303 (Supp. 1994).

KENTUCKY:
Inquiry upon reasonable grounds to believe that the defendant is incompetent. Ky. R. Crim. Proc. 8.06 (1994-95). Includes examination by at least one psychiatrist or psychologist; hearing. Ky. Rev. Stat. Ann. § 504.100 (1990). Standard of proof: no information. If incompetent, court may commit the defendant to a treatment facility for a statutory period. Ky. Rev. Stat. Ann. § 504.110 (Michie 1990).

LOUISIANA:
Inquiry upon reasonable grounds to doubt capacity to proceed. La. Code Crim. Proc. Ann. art. 643 (West 1981). Includes mental examination by two or three physicians; hearing. La. Code Crim. Proc. Ann. art. 643, 644 (1981). Standard of proof: "clear preponderance of evidence" that defendant is incompetent. *State v. Gwinn*, 373 So. 2d 1304 (La. 1979). (Note: La. Code Crim. Proc. Ann. art. 648 (Supp. 1995) indicates "clear and convincing" proof standard; however, Louisiana Attorney General indicates that this applies only if original inquiry finds defendant competent.) If found incompetent, court shall commit defendant to a state mental institution for custody, care, and treatment for as long

as the incompetency endures. La. Code Crim. Proc. Ann. art. 648 (Supp. 1995).

MAINE:
Inquiry required upon "good cause shown." Includes examination by psychiatrist or psychologist; hearing. Standard of proof: no information. If incompetent, court may place the defendant in a mental health facility for observation, care and treatment. Me. Rev. Stat. Ann. tit. 15, § 101-B (Supp. 1994).

MARYLAND:
Inquiry if defendant appears incompetent or if defense alleges incompetency. Md. Code Ann. [Health-Gen.] § 12-103(a) (1994). Includes optional clinical examination; hearing. Md. Code Ann. [Health-Gen.] § 12-104 (1994). Standard of proof: competency must be proven beyond reasonable doubt. *Treece v. State*, 547 A.2d 1054 (Md. 1988). If incompetent, may be committed to mental health facility if dangerous to self or others until no longer incompetent or no longer a danger to self or others. Md. Code Ann. [Health-Gen.] § 12-105 (1994).

MASSACHUSETTS:
Inquiry upon doubt of competency. Mass Gen. Laws Ann. ch. 123, § 15 (Supp. 1995). Includes optional psychological examination; hearing. Mass Gen. Laws Ann. ch. 123, § 15(c) (Supp. 1995). Standard of proof: preponderance of evidence. Mass Gen. Laws Ann. ch. 123, §15(d) (West Supp. 1995). If incompetent, court may order a period of hospitalization for examination and observation. Mass Gen. Laws Ann. ch. 123, § 16(a) (West Supp. 1995).

MICHIGAN:
Inquiry if court is presented with information which would raise a bona fide doubt as to competency. *People v. Kearns*, 181 N.W.2d 548 (Mich. Ct. App. 1970). Includes mandatory examination by designated mental health professionals; hearing. Mich. Comp. Laws Ann. § 330.2030 (1992). Standard of Proof: discretion of trial court. *People v. Ritsema*, 307 N.W.2d 380, 383 (Mich. Ct. App. 1981). If found incompetent, and substantial likelihood found of gaining competence within specified time period, court shall order treatment. Mich. Comp. Laws Ann. § 330.2032 (1992). Such confinement for treatment shall not exceed 15 months. *People v. Miller*, 489 N.W.2d 60 (Mich. 1992).

MINNESOTA:
Inquiry upon "reason to doubt" competency. M.S.A. Rules Crim. Proc., R. 20.01.2 (1994). Includes examination by at least one medical examiner; hearing. M.S.A. Rules Crim. Proc., R. 20.01.2(3), 20.01.3. Standard of proof: "greater weight" of evidence that defendant is competent. M.S.A. Rules Crim. Proc., R. 20.01.3(6). If incompetent, variable dispositions available, including treatment, depending upon level of charged offense and other factors. M.S.A. Rules Crim. Proc., R. 20.01.4.

MISSISSIPPI:
Inquiry required upon "reasonable probability that defendant is incapable of making a rational defense." *Emanuel v. State*, 412 So.2d 1187 (Miss. 1982). Inquiry includes optional mental examination by a competent psychiatrist; hearing. Misss Code Ann. § 99-13-11 (1994). Standard of proof: Preponderance of evidence. *Griffin v. State*, 504 So.2d 186 (Miss 1987). Disposition upon incompetency finding: no information.

MISSOURI:
Inquiry upon reasonable cause to believe that the defendant is unfit to proceed. Includes examination by one or more psychiatrists or psychologists; hearing. Mo. Rev. Stat. § 552.020 (1994). Standard of proof: court must be "satisfied" that the defendant is competent. *Missouri v. Clark*, 546 S.W.2d 455 (Mo. Ct. App. 1976). If incompetent, court commits defendant to Dep't of Mental Health for up to 6 months; then another hearing is held to determine whether the accused is likely to regain competency. Mo. Rev. Stat. § 552.020 (1994).

MONTANA:
Inquiry upon written motion or if issue raised by trial court. Includes examination by any method accepted by medical or psychological professions; hearing. Mont. Code Ann. § 46-14-202 (1995). Standard of proof: no information. If incompetent, court commits defendant for treatment, with competency review in 90 days. Mont. Code Ann. § 46-14-221(2) (1995).

NEBRASKA:
Inquiry when it appears that the accused has become mentally incompetent. Includes medical, psychiatric or psychological examination; hearing. Standard of proof: no information. If incompetent, defendant committed to state hospital until competent. Neb. Rev. Stat. § 29-1823 (1989).

NEVADA:
Inquiry upon reasonable doubt of competency. *Jones v. State*, 817 P.2d 1179 (Nev. 1991). Includes examination by two examiners. Nev. Rev. Stat. Ann. § 178.415 (1992). Standard of proof: no information. If incompetent, may be committed

for treatment; outpatient treatment permitted if defendant not dangerous. Nev. Rev. Stat. Ann. § 178.425 (Michie 1992).

NEW HAMPSHIRE:
Inquiry upon "bona fide doubt" of competency, or "question of sanity." *State v. Zorzy*, 622 A.2d 1217 (N.H. 1993); N.H. R.S.A. 135:17 (1990). Nature of inquiry: no information (apparently guided by case law). Standard of proof: preponderance. *Zorzy*, 622 A.2d at 1219. If incompetent, defendant "evaluated for commitment" to mental health treatment. N.H. R.S.A. 135:17-a (Supp. 1994).

NEW JERSEY:
Inquiry upon reason to doubt fitness to proceed. Includes examination by at least one qualified psychiatrist; hearing. N.J. Rev. Stat. Ann. § 2C:4-5 (1995). Standard of Proof: preponderance. *State v. Otero*, 570 A.2d 503, 505 (N.J. Super. L. 1989). Commitment for inpatient treatment if defendant dangerous to self or others; otherwise, outpatient treatment permitted. N.J. Rev. Stat. Ann. §2C:4-6 (1995).

NEW MEXICO:
Inquiry upon reasonable doubt of competency. N.M. R. Crim. P. 5-602B (1992). Includes mental examinations; hearing. N.M. Stat. Ann. § 31-9-2 (1984). Standard of proof: preponderance or greater weight of evidence. *State v. Santillanes,* 580 P.2d 489 (N.M. App. 1978). If incompetent, commitment for treatment allowed; secure facility commitment permitted only upon clear and convincing evidence that the defendant is dangerous. N.M. R. Crim. P. 5-602B (1992); N.M. Stat. Ann. § 31-9-1 (1984).

NEW YORK:
Inquiry if the defendant "may be" incompetent. Includes examination by two qualified psychiatric examiners; hearing. N.Y. [Crim. Proc.] Law § 730.20 (1995). Standard of proof: Preponderance of evidence that defendant is competent. *People v. Breeden*, 115 A.D.2d 484, 495 N.Y.S.2d 715 (1985). If incompetent, may be committed for treatment up to 90 days. N.Y. [Crim. Proc.] Law § 730.40 (McKinney 1995).

NORTH CAROLINA:
Inquiry required upon motion. Includes examination by one or more medical experts; hearing. N.C. Gen. Stat. § 15A-1002 (1988). Standard of proof: no information. If incompetent, civil commitment or release ordered. N.C. Gen. Stat. § 15A-1004 (1988).

NORTH DAKOTA:
Inquiry upon reason to doubt competency. N.D. Cent. Code § 12.1-04-04 (1985). Includes examination by psychiatrist; hearing. N.D. Cent. Code § 12.1-04-06 (1985). Standard of proof: preponderance of evidence that the defendant is competent. *State v. VanNatta*, 506 N.W.2d 63 (N.D. 1993). If incompetent, may be committed to the state hospital, only so long as needed to determine likelihood of regaining competency; continued commitment must be justified by progress toward fitness to proceed. N.D. Cent. Code § 12.1-04-08 (1985).

OHIO:
Inquiry "if raised" before trial; during or after trial, inquiry only "for good cause." Ohio Rev. Code Ann. § 2945.37 (1993). Includes evaluation by one to three experts; hearing. Ohio Rev. Code Ann. § 2945.371 (1993). Standard of proof:

preponderance. Ohio Rev. Code Ann. § 2945.37. If incompetent but likely to regain competency, the court may order treatment up to fifteen months or 1/3 of the longest minimum sentence that could be imposed for charged offense; otherwise may refer to probate court for civil commitment proceedings. Ohio Rev. Code Ann. § 2945.38 (C)-(D) (1993).

OKLAHOMA:
Inquiry upon facts "sufficient to raise a doubt" of competency. Okla. Stat. Ann. tit. 22, § 1175.2A (1986). Includes examination by "doctors or appropriate technicians;" hearing. Okla. Stat. Ann. tit. 22, §§ 1175.3D, 1175.4 (Supp. 1995). Standard of proof: clear and convincing evidence of incompetency. Okla. Stat. Ann. tit. 22, § 1175.4B (Supp. 1995). If incompetent, commitment to state agencies (Human Services, Mental Health, or Substance Abuse), which may include confinement, depending upon likelihood of recovering competency, and dangerousness. Okla. Stat. Ann. tit. 22, §§ 1175.6, 1175.7 (Supp. 1995).

OREGON:
Inquiry required upon reason to doubt fitness to proceed. Or. Rev. Stat. § 161.360 (1993). Includes clinical examination by psychiatrists; hearing. Or. Rev. Stat. § 161.365(2) (1993). Standard of proof: no information. If incompetent, commitment to hospital or outpatient treatment, or other treatment suited to the defendant's condition. Or. Rev. Stat. § 161.370(2) (1993).

PENNSYLVANIA:
Inquiry required upon prima facie question of incompetency. Pa. Stat. Ann. tit. 50 § 7402(d) (Supp. 1995). Includes evaluation by at least one psychiatrist; hearing. Pa. Stat.

Ann. tit. 50 § 7402(e)(4) (Supp. 1995). Standard of proof: clear and convincing evidence of incompetency. Pa. Stat. Ann. tit. 50 § 7403(a) (Supp. 1995). If incompetent, court may order involuntary hospitalization and treatment if reasonably certain the treatment will restore competency. Pa. Stat. Ann. tit. 50 § 7402(b) (Supp. 1995).

RHODE ISLAND:
Inquiry if it justifiably appears that the defendant is incompetent. R.I. Gen. Laws § 40.1-5.3-3(c) (Supp. 1994). Includes clinical examination; hearing. R.I. Gen. Laws § 40.1-5.3-3(f) (Supp. 1994). Standard of proof: clear and convincing evidence that defendant is incompetent. R.I. Gen. Laws § 40.1-5.3-3 (Supp. 1994). If incompetent, involuntary commitment allowed for further observation or if the defendant is dangerous to himself or others. R.I. Gen. Laws § 40.1-5.3-3(i)(3) (Supp. 1994).

SOUTH CAROLINA:
Inquiry upon reason to believe that the defendant is incompetent. S.C. Code Ann. § 44-23-410 (1985). Includes examination by two mental health experts; hearing. S.C. Code Ann. § 44-23-420 (1985). Standard of proof: preponderance of evidence. *State v. Lee*, 264 S.E.2d 418 (S.C. 1980). If incompetent and likely to become competent, hospitalization for up to 60 days ordered. If unlikely to become competent, judicial admission proceedings are commenced. S.C. Code Ann. § 44-23-430(2)-(3) (1985).

SOUTH DAKOTA:
Inquiry upon reasonable cause to believe that the defendant may be incompetent. Includes psychiatric or psychological examination of the defendant; hearing. S.D. Codified Laws Ann. § 23A-10A-3 (Supp. 1995). Standard of proof:

preponderance. S.D. Codified Laws Ann. § 23A-10A-6.1 (1988). If incompetent, committed to custody of the human services center for treatment and observation as to whether he is likely to become competent. S.D. Codified Laws Ann. § 23A-10A-4 (Supp. 1995).

TENNESSEE:
Inquiry when defendant is believed incompetent. Includes examination by a mental health center or licensed private practitioner; hearing. Tenn. Code Ann. § 33-7-301 (Supp. 1995). Standard of proof: no information. If incompetent, may order involuntary hospitalization if there is a danger of harm to self or others and if treatment is in defendant's best interest. Tenn. Code Ann. § 33-7-301(5) (Supp. 1995).

TEXAS:
Inquiry required upon "some evidence" of incompetency. Tex. [Crim. Proc.] Code Ann. 46.02 § 2 (1979). Includes examination of defendant by mental health expert; hearing. Tex. [Crim. Proc.] Code Ann. 46.02 § 3 (1979). Standard of Proof: preponderance. Tex. [Crim. Proc.] Code Ann. 46.02 § 1 (b) (1979). If incompetent, hospitalization and treatment for the purpose of attaining competency. for a period of between 60 days and 18 months. Tex. [Crim. Proc.] Code Ann. 46.02 § 5 (1979).

UTAH:
Inquiry upon "bona fide" doubt of competency. Utah Code Ann. § 77-15-5 (1995). Includes evaluation through Dep't of Human Services by at least two mental health experts not currently involved in the defendant's treatment; hearing. Utah Code Ann. § 77-15-5(2)(a)-(8) (1995). Standard of proof: preponderance. Utah Code Ann. § 77-15-5(10) (1995). If incompetent, may be committed for treatment,

limited by likelihood of restoring competency in the foreseeable future. Utah Code Ann. §§ 77-15-5(11), 77-15-6(4), -(5) (1995).

VERMONT:
Inquiry if either attorney raises the issue, or the court has reason to believe the defendant may not be competent. Includes clinical examination; hearing. Vt. Stat. Ann. tit. 13 § 4817(b) (1974). Standard of proof: no information. If incompetent, hearing ensues to decide if the defendant needs treatment or hospitalization. Vt. Stat. Ann. tit. 13 § 4820 (Supp. 1995).

VIRGINIA:
Inquiry upon probable cause to believe the defendant is incompetent. Includes clinical evaluation by at least one psychiatrist, clinical psychologist, or master's level psychologist qualified in forensic evaluation; hearing. Standard of proof: preponderance. Va. Code Ann. § 19.2-169 (1995). If incompetent, court shall order in-patient or outpatient treatment to restore competency as appropriate. Va. Code Ann. § 19.2-169.2 (1995).

WASHINGTON:
Inquiry upon reason to doubt competency. Includes evaluation by two or more qualified examiners; hearing. Wash. Rev. Code Ann. § 10.77.060 (1994). Standard of proof: preponderance. If incompetent, may be placed in an appropriate facility for evaluation and treatment for up to 90 days, then judicial rehearing. Wash. Rev. Code Ann. § 10.77.090 (1994).

WEST VIRGINIA:
Inquiry upon court's belief that defendant may be incompetent. W. Va. Code § 27-6A-1(a) (1992). Includes examination by one or more psychiatrists or psychologists; hearing. W. Va. Code § 27-6A-1(a) - (c) (1992). Standard of proof: preponderance. W. Va. Code § 27-6A-1(d) (1992). If incompetent, may be committed to mental health facility for up to six months plus three-month extension if needed. Civil commitment referral if no possibility of regaining competency. W. Va. Code § 27-6A-2(b) - (d) (1992).

WISCONSIN:
Inquiry upon reason to doubt competency. Includes evaluation by one or more qualified examiners; hearing. Wis. Stat. § 971.14(2) (1993-94). Standard of proof: greater weight of the evidence that the defendant is competent to proceed; but if the defendant claims to be competent, the court will find him competent unless the state proves by clear and convincing evidence that he is not competent. Wis. Stat. § 971.14(4)(b) (1992). If incompetent, may be committed to Dep't of Health and Social Services for up to one year or maximum time which could be imposed as a sentence for the crime, whichever is less. If found incompetent to refuse treatment or medication, the court may order that the medication be administered or the treatment given. Wis Stat. § 971.14(5) (1993-94).

WYOMING:
Inquiry upon reasonable doubt as to competency. Wyo. Stat. § 7-11-303(a) (1995). Includes examination by qualified examiner; hearing. Wyo. Stat. § 7-11-303(b)-(f) (1995). Standard of proof: preponderance. *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989). If incompetent: no information about commitment for treatment.

APPENDIX II

APPENDIX II

EXCERPTS FROM CONNECTICUT LEGISLATIVE HEARINGS RE: PUBLIC ACT NO. 81-365, SENATE BILL NO. 1066, AN ACT CONCERNING COMPETENCY TO STAND TRIAL (amending Conn. Gen. Stat. § 54-56d)

(NOTE: Full copies of this published legislative history, as provided by the Connecticut Chief State's Attorney Office, are lodged with this Court and provided to counsel for Petitioner and Respondent)

Judiciary Committee Hearing, 03 March 1981:

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DR. HOWARD ZONANA: Hello, I'm Dr. Howard Zonana, I'm the representative of the -- the legislative representative of the Connecticut Psychiatric Society and I'm also the Co-Director of the Lawrence Psychiatry Unit at the Connecticut Mental Health Center which performs competency to stand trial evaluations and I'm here testifying on Committee Bill 1066, the competency to stand trial bill.

This bill represents essentially the same bill which was introduced last year and for reasons which were not altogether clear to me because I don't think there was any substantial opposition to it. It was not dealt with in the last session. In the interim, as we had thought, the federal court declared the current competency to stand trail [sic] unconstitutional and this created a severe disruption in the courts --

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SEN. OWENS: Is this the judgement [sic] of the ruling of Judge Allen [sic: Ellen] Burns in the district court --

DR. ZONANA: -- In Deangelis vs. (inaudible) --

SEN. OWENS: -- did you get an opportunity to look at this bill 1066 so far as technical changes --

DR. ZONANA: Yes I have, and Attorney McCullough is here from the Commissioner's office has made a number of changes in the current bill to pick up some of the issues that were raised in Judge Burns' decision so that issues like probable cause which came up in that some defendants prior to arraignment have competency evaluations or that there should be probable cause that they committed a criminal act.

SEN. OWENS: You know this bill came to us, and obviously I was concerned because it had an impact and effect of the courts, particularly with respect to the 5440 [Conn. Gen. Stat. § 54-40] hearings. I suggested that the people who were interested in the changes sit down with Austin McQuiggan from the State's Attorney's Office and come up with a bill--do you know whether there's been any input by them on this bill?

DR. ZONANA: Yes, I think there has been. I'm talking more from both working on these from the front line in contrast to the insanity defense which gets a lot of publicity. The number of people effected [sic] by the competency to stand trial is substantially more and creates a greater impact. I would just like to say that in terms of the changes that are recommended in this bill, which Attorney McCullough will

detail for you, I would say that our group who does these evaluations, both as a team and as a psychiatrist individually, that basically I think most of these changes are all ones that we both support and have participated in and can live with and they basically cover the areas of probable cause and least restrictive alternatives that someone if found incompetent does not necessarily have to be incarcerated and if it is deemed feasible that they can respond to out-patient treatment and the issues of bail should not overlap with issues of treatment. The only things which raise some question have to do with the number of people who can observe and sit in on these evaluations and recommendations which would change from the bill here so that [p.768] it is now said that a psychiatrist or physician specializing in psychiatry can witness the evaluation or the defendant's attorney may also be present. Now, with the team, this can get to maybe five people in the room, which can undercut it, but I think it's basically something again that we can live with as long as it does not go beyond that.

It also raises the burden of proof to a clear and convincing standard which I think stems from the clear and convincing standard that the Supreme Court raised in civil commitment. I would prefer to answer questions to see where the hang-up in the bill came from last year so that hopefully we will not have a repeat of this because it certainly did create a difficulty in the court with just sending patients home with attorneys.

SEN. OWENS: Any questions of the Doctor? Thank you, Doctor. Let's go to Mr. McCullough please, since we're talking about this bill.

WITNESS MC CULLOUGH: My name is William McCullough. I'm an Assistant Attorney General and I represent the Department of Mental Health. I'm here to speak in behalf of Senate Bill 1066, An Act Concerning Competency to Stand Trial.

As Dr. Zonona mentioned, this bill is at this point a direct result of the DeAngelis vs. Plaut decision which declared portions of then Section 54-40 unconstitutional last fall.

SEN. OWENS: DeAngelis vs. ? --

MR. MC CULLOUGH: Plaut -- Commissioner Plaut of the Department of Mental Health. And also as the Dr. mentioned, this was the basic draft that was created some three years ago, although there have been many changes since then. I have participated in the drafting of this bill and --

SEN. OWENS: Who else worked with you on the drafting? Any other agencies --

MR. MC CULLOUGH: Okay, the original draft came out of a committee that Commissioner Plaut had created consisting of people **[p. 769]** from various agencies. That has undergone tremendous revisions since then. At this point, I have been trying to keep the State's Attorney's office involved --

SEN. OWENS: Who have you been working with in the State's Attorney's office?

MR. MC CULLOUGH: Okay, I have been sending all of the changes and all of the proposed drafts to I think it's Mr. Sabo

of the State's Attorney's office, the Deputy State Attorney, and also to Mr. McQuiggan --

SEN. OWENS: Mr. McQuiggan's here. Did you talk to him today?

MR. MC CULLOUGH: I have not talked to him personally, no, but I have sent him drafts of all of the proposals.

SEN. OWENS: Now, really, this bill shouldn't -- this bill obviously what we're trying to do is clear up a constitutional question that has resulted as a result of Judge Burns' decision. And I just want to make sure that the people that will be defending the bill, you know, the problems as they come up, will really be people from the prosecutor's office from the Chief State's Attorney's office. So, I would like to have -- I thought that there had been a consensus and that you would have been able to sit down and say, this is a bill that the law enforcement people agree to and so forth and it meets all of the criteria and all of the changes as suggested by Judge Burns' decision. I just don't want to get into the committee -- you know what you're going to do? I'll put it on the table for you. You're going to end up losing the bill unless you come in here and you say that it's been worked out, that the State's Attorney can agree to this, I can agree to it and so forth. Otherwise, if you can't, then it's going to be Very hard for laypeople to sit down and put it together also.

MR. MC CULLOUGH: I've been attempting for the past year and a half to get the State's Attorney's office to give me some of their suggestions or objections. I've gotten some information from various people in the staff. I've attempted to keep them up-to-date as to what I have done. We have had meetings with the Judicial Department. They have made

recommendations **[p. 770]** that have been incorporated in what I'm going to give you. And as I said before, the Attorney General's office and the Department of Mental Health have also been helpful.

The case, the DeAngelis v. Plaut case, was my case. I was involved with that and as far as --

SEN. OWENS: I didn't mean to cut you off -- go ahead.

MR. MC CULLOUGH: To answer your question, I think that I've done everything I could to get the State's Attorney's office involved. Now, if they have -- they have not given me any information other than an letter that I got today with some objections which I got straightened out with Attorney Derrington, who has testified earlier, he's still here by the way and would like to testify on this bill.

SEN. OWENS: Oh, he is going to testify -- Derrington, Mike Derrington? Is he still here?

MR. MC CULLOUGH: Was here. The bill clarifies and simplifies the language of the statute. It also incorporates all of Judge Burns' requirements. Now, the State's Attorney's Office I believe has some question about a couple of provisions dealing with the placement of certain things in the bill. I have no objection to their interpretation as to how that should be.

I would like to point out that the clear and convincing standard that is in the proposal came out of the Supreme Court's decision in Mattington [sic: Addington] vs. Texas dealing with the standard that's required for civil commitment. I have, by the way, the proposal that you have

was based on an earlier draft. I have changes since then which I have highlighted as to what should be in the bill as it now should read.

SEN. OWENS: I wonder, could you sit down with Mr. McQuiggan or a representative of his office sometime and come up with a draft that's suitable to the prosecutor's staff and to the agency that you represent?

MR. MC CULLOUGH: I would be happy to. I've offered to do that in the past and nothing's come out of it.

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REP. TULISANO: We'll get somebody from the legislature (inaudi[]ble)

MR. MC CULLOUGH: By the way, I've worked with the Law Revision Commission on this also.

SEN. OWENS: Yeah, I sent over a letter to them and they said it was going to take another month to get the, you know, they were still looking into the thing.

MR. MC CULLOUGH: Mr. Dickland is here from the Law Revision Commission and I've been working with him on this. Any questions? I'll be happy to get together with anybody that wants to. I think this is important, and --.

SEN. OWENS: Mr. Gouer. Excuse me, Warren, do you have a copy of Judge Burns' decision with you?

: I don't have it with me, no, but I can get it. [to other business]